Rule 704. Opinion on an Ultimate Issue.

(a) In General--Not Automatically Objectionable. An opinion is not objectionable just because it embraces an ultimate issue.

(b) Exception. In a criminal case, an expert witness must not state an opinion about whether the defendant did or did not have a mental state or condition that constitutes an element of the crime charged or of a defense. Those matters are for the trier of fact alone.

Comment to 2012 Amendment

Subsection (b) has been added to conform to Federal Rule of Evidence 704, which was amended in 1984 to add comparable language. The new language in the Arizona rule is considered to be consistent with current Arizona law.

Additionally, the language of Rule 704 has been amended to conform to the federal restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent in the restyling to change any result in any ruling on evidence admissibility.

The Court deleted the reference to an "inference" on the grounds that the deletion made the rule flow better and easier to read, and because any "inference" is covered by the broader term "opinion." Courts have not made substantive decisions on the basis of any distinction between an opinion and an inference. No change in current practice is intended.

Comment

Some opinions on ultimate issues will be rejected as failing to meet the requirement that they assist the trier of fact to understand the evidence or to determine a fact in issue. Witnesses are not permitted as experts on how juries should decide cases.

Cases

704.010 Opinion evidence is admissible even if it involves an ultimate issue in the case.

State v. Chappell, 225 Ariz. 229, 236 P.3d 1176, ¶¶ 16–18 (2010) (state alleged killing was especially cruel; medical examiner testified that drowning was "horrifying experience" and "10" on "scale of 1 to 10"; defendant contended this was improper opinion on ultimate issue; court noted testimony was about experience of drowning and not opinion whether victim suffered, thus comments were neither improper nor embracing ultimate issue).

Fuenning v. Superior Ct., 139 Ariz. 590, 680 P.2d 121 (1983) (in DUI case, police officer may give opinion defendant displayed symptoms of intoxication, but should not give opinion defendant was driving while intoxicated, which amounts to giving opinion on defendant's guilt).

State v. Fornof, 218 Ariz. 74, 179 P.3d 954, ¶¶ 20–21 (Ct. App. 2008) (officer testified that defendant had 43 grams of cocaine base that was worth $4,360, cash in predominately $20 bills, and no means of smoking that cocaine; trial court did not err in allowing expert witness to testify based on that evidence that defendant possessed the cocaine for sale rather than personal use).

State v. Campoy (Cordova), 214 Ariz. 132, 149 P.3d 756, ¶¶ 6–12 (Ct. App. 2006) (defendant was charged with DUI; court held trial court abused discretion in ruling that state's witnesses, when testifying about FSTs, could not use such terms as "impairment," "sobriety," "tests," "pass/fail," "marginal," or "field sobriety test").

State v. Lummus, 190 Ariz. 569, 950 P.2d 1190 (Ct. App. 1997) (court was concerned that officer testified that, on intoxication scale of 1 to 10, defendant was 10+, but held error was harmless beyond reasonable doubt).

Souza v. Fred Carriers Contracts, Inc., 191 Ariz. 247, 955 P.2d 3 (Ct. App. 1997) (accident reconstruction expert should have been permitted to give opinion on how and why accident happened; trial court therefore erred in granting defendant's motion for summary judgment).

State v. Corona, 188 Ariz. 85, 932 P.2d 1356 (Ct. App. 1997) (expert testimony on how a person can promote a gang by stating name of gang and by making threats did not amount to telling jurors how to decide the case).

State v. Carreon, 151 Ariz. 615, 617, 729 P.2d 969, 971 (Ct. App. 1986) (police officer permitted to give opinion that, based on way that defendant carried cocaine and money, drugs were possessed for sale).

704.020 Testimony must assist the jurors to understand the evidence or to determine a fact in issue and not merely tell the jurors how they should decide the case.

State v. Blakley, 204 Ariz. 429, 65 P.3d 77, ¶¶ 33–39 (2003) (trial court permitted expert witness to testify about police interrogation tactics and their coercive effect court held trial court did not abuse discretion in precluding expert from giving opinion on whether tactics in this case were coercive and giving opinion whether defendant's confession was voluntary).

* *State v. Sosnowicz,* 229 Ariz. 90, 270 P.3d 917, ¶¶ 15–26 (Ct. App. 2012) (defendant drove his vehicle over victim, and claimed it was accident; state claimed defendant either intentionally, knowingly, or recklessly drove over victim; medical examiner testified manner of death was homicide; because medical examiner's opinion was based on information he had received from police officers and not on any specialized knowledge or personal examination of body, court held that testimony essentially was ultimate issue in case and did not assist jurors in determining case, thus trial court should not have admitted that testimony, but any error was harmless).

Webb v. Omni Block Inc., 216 Ariz. 349, 166 P.3d 140, ¶¶ 11–22 (Ct. App. 2007) (court held that trial court erred in allowing defendant's expert witness to give opinion on percentage of fault to be attributed to each party, and error required reversal).

State v. Herrera, 203 Ariz. 131, 51 P.3d 353, ¶¶ 7–8 (Ct. App. 2002) (while testifying about FSTs, officer stated, "I felt he was impaired to the slightest degree"; court held officer's testimony was impermissible, but trial court did not err in denying motion for mistrial because trial court immediately struck officer's testimony and gave detailed curative instruction, and in final instruction repeated that curative instruction and told jurors to disregard any stricken testimony).

State v. Lummus, 190 Ariz. 569, 950 P.2d 1190 (Ct. App. 1997) (court was concerned that officer testified that, on intoxication scale of 1 to 10, defendant was 10+, but held error was harmless beyond reasonable doubt).

State v. Reimer, 189 Ariz. 239, 941 P.2d 912 (Ct. App. 1997) (when victim gave a different version when testifying, trial court erred in allowing officer to give opinion that victim was not lying when she gave version at time of assault).

704.025 Although results of field sobriety tests (FSTs) are not admissible to quantify an accused's blood alcohol concentration, they are relevant evidence of an accused's impairment, thus an officer may testify about the manner in which defendant performed the FSTs, and may testify they administered FSTs in an attempt to determine whether defendant was in fact intoxicated and was intoxicated while driving.

State v. Campoy (Cordova), 214 Ariz. 132, 149 P.3d 756, ¶¶ 6–12 (Ct. App. 2006) (defendant was charged with DUI; court held trial court abused discretion in ruling that state's witnesses, when testifying about FSTs, could not use such terms as "impairment," "sobriety," "tests," "pass/fail," "marginal," or "field sobriety test").

704.030 An expert may testify about behavioral characteristics of certain classes of persons, but may not give an opinion about the accuracy, reliability, or truthfulness of a particular person, or quantify the percentage of such persons who are truthful.

State v. Lujan, 192 Ariz. 448, 967 P.2d 123, ¶¶ 8–9, 11–13, 16, 20–21 (1998) (because defendant admitted playing with victim in swimming pool but denied ever touching victim's private parts, defendant was entitled to show victim was hypersensitive to interaction with adult males and thus may have mis-perceived her physical contact with defendant, and thus should have been allowed to introduce expert testimony about how victim's nearly contemporaneous sexual abuse by others may have caused victim to mis-perceived defendant's actions).

State v. Reimer, 189 Ariz. 239, 941 P.2d 912 (Ct. App. 1997) (when victim gave a different version when testifying, trial court erred in allowing officer to give opinion that victim was not lying when she gave version at time of assault).

704.035 Although an expert may not give an opinion about the accuracy, reliability, or truthfulness of a particular person, a witness may disclose to jurors those facts that caused the witness not to believe a particular person.

State v. Doerr, 193 Ariz. 56, 969 P.2d 1168, ¶¶ 25–27 (1998) (on cross-examination, defendant elicited testimony from officer that he did not believe defendant was truthful during questioning on day of arrest; on rebuttal, state permitted to ask officer why he did not believe defendant was being truthful).

* *State v. Martinez,* 230 Ariz. 382, 284 P.3d 893, ¶¶ 10–13 (Ct. App. 2012) (after defendant successfully fled from law enforcement vehicle, he later called police and reported someone had stolen his vehicle; in opening statement and on cross-examination of officer, defendant's attorney implied officer was less than diligent in his investigation of stolen vehicle claim; officer permitted to testify defendant's actions were standoffish and odd, and defendant's "story did not match up; it seemed like [defendant] was being evasive and lying"; court held officer's testimony was necessary to explain why officer did not continue to investigate alleged stolen vehicle).

704.040 An expert may give an opinion of the defendant's state of mind at the time of the offense only when the defendant raises an insanity defense.

State v. Mott, 187 Ariz. 536, 931 P.2d 1046 (1997) (defendant was charged with child abuse for failure to seek treatment for her child after child was injured while in care of defendant's boyfriend; defendant wanted to introduce evidence that her condition as battered woman caused her to form "traumatic bond" with her boyfriend, caused her to feel hopeless and depressed and

that she could not escape, interfered with her ability to sense danger and protect others, and caused her to believe what her boyfriend told her and to lie to protect him, all of which would preclude her from forming necessary intent; court held this was merely another form of diminished capacity, which legislature has refused to adopt, thus evidence was not admissible).

State v. Wright, 214 Ariz. 540, 155 P.3d 1064, ¶¶ 6–7 (Ct. App. 2007) (defendant was charged with theft of means of transportation, which requires knowingly controlling vehicle with intent to deprive permanently; defendant sought to introduce expert testimony that his "mental capacity was lowered and that he is a naive-type of person" and thus could not have mental state necessary to commit crime; court held that *State v. Mott* precluded evidence of diminished capacity defense).

704.045 Although an expert may not give an opinion about the defendant's state of mind on the issue of *mens rea,* an expert may testify about the defendant's behavior that the expert observed.

State v. Wright, 214 Ariz. 540, 155 P.3d 1064, ¶¶ 11–12, 15–17 (Ct. App. 2007) (defendant was charged with theft of means of transportation, which requires knowingly controlling vehicle with intent to deprive permanently; defendant sought to introduce expert testimony that his "mental capacity was lowered and that he is a naive-type of person" and thus could not have mental state necessary to commit crime; court concluded that expert testimony was about defendant's mental capacity generally and did not constitute observation evidence about defendant's relevant behavioral characteristics bearing on defendant's state of mind at time of offense, thus trial court properly precluded this evidence).